Supreme Court, U.S.
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NO._____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

McDERMOTT INTERNATIONAL, INC.,
Petitioner,
v.
ROSEMARY BEASLEY, WIFE OF/AND GEORGE BEASLEY,
Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

PETITION FOR WRIT OF CERTIORARI

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44 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether The Louisiana Courts May Apply The Maritime Law And Statutes Of The United States To The Claim Of A Worker Employed By A Malaysian Company Pursuant To An Employment Contract Signed In Malaysian Waters Which Provides A Malaysian Remedy When He Was Injured During A Construction Project On The Malaysian Continental Shelf On A Vessel Registered In Malaysia, Flying The Flag Of Malaysia and Owned By A Malaysian Corporation?

2. Whether the Louisiana Courts May Contradict The Uniform Admiralty Law Declared By The Federal Courts In Order To Apply Their Own Principles of Admiralty Law?

3. Whether The Louisiana Courts May Engage In "Social Jingoism" In Order To Apply American Law To Injuries Occurring To Americans Anywhere In the World?

LIST OF PARTIES

The undersigned counsel of record certifies that the following persons and parties have an interest in the outcome of this case:

1. Petitioner, McDermott International, Inc., McDermott International, Inc. has no parent company. The following is a list of companies and partnerships which are partially but not wholly owned by McDermott International, Inc.: McDermott - ETPM East, Inc., McDermott - ETPM, Inc., P.T. Bataves Fabricators, Malmac Sdn. Bhd., McDermott Incorporated, P.T. Babcock & Wilcox Indonesia, McDermott Abu Dhabi Offshore Construction Company, McDermott Arabia Company Limited, Initec, Astano y McDermott International Inc., S.A., Davy McDermott Limited, McDermott - E.T.P.M. Management Services S.A., MacShelf Ltd., McDermott - ETPM (Norway), Inc.

2. Respondents, Rosemary Beasley and George Beasley.

3. Kenneth G. Engerrand, Brown, Sims, Wise & White, Henry A. King, Nesser, King & LeBlanc, Counsel for Petitioner, McDermott International, Inc.

4. Lawrence D. Wiedemann, Karl Wiedemann, Wiedemann & Wiedemann, Counsel for Respondents, Rosemary Beasley and George Beasley.

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Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Rosemary Beasley, wife of/and George Beasley filed suit on January 27, 1992 against McDermott International, Inc. in the Civil District Court for the Parish of Orleans, Louisiana seeking recovery for injuries allegedly received by George Beasley on a Malaysian vessel on the Malaysian Continental Shelf. The suit alleged that George Beasley, a resident of Mississippi, was a seaman and entitled to recover under the Jones Act, 46 U.S.C. app. § 688, and the general maritime law. McDermott International, Inc. filed a Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment asserting that the Plaintiffs' claims under the Jones Act and general maritime law of the United States should be dismissed because United States law does not apply to the Plaintiffs' action, and the district judge entered a judgment on April 26, 1994 that United States substantive law applied in this case. (Appendix A).

On May 24, 1994, the Louisiana Court of Appeal for the Fourth Circuit reversed the ruling of the district judge that United States law applied and held that the Plaintiffs' claims should be decided under Malaysian law. (Appendix B, *Beasley v. McDermott International, Inc.*, 637 So.2d 1219, 1221 (La. App. (4th Cir.) 1994)). On June 24, 1994, the Louisiana Supreme Court reversed the holding of the court of appeal and reinstated the decision of the district judge to apply American law. (Appendix C, *Beasley v. McDermott International, Inc.*, 640 So.2d 1326 (La. 1994)). Petitioner's Application for Rehearing to the Louisiana Supreme Court was denied on September 16, 1994. (Appendix D, *Beasley v. McDermott International, Inc.*, 642 So.2d 185 (La. 1994)).

JURISDICTION

The Petition for Writ of Certiorari seeks review of the decision of the Louisiana Supreme Court on June 24, 1994 to apply American law (the Jones Act, 46 U.S.C. app. § 688, and general maritime law of the United States) to this case. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a). The Application for Rehearing was denied by the Louisiana Supreme Court on September 16, 1994. The Petition for Writ of Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c) and Sup. Ct. R. 13.4.

STATUTE PRESENTED FOR REVIEW

This case involves a direct conflict between the Louisiana Supreme Court and the federal courts in the interpretation of the Jones Act, 46 U.S.C. app. § 688:

Recovery For Injury To Or Death Of Seaman

(a) Application of railway employee statutes; jurisdiction

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

> (1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for

maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred--

> (A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources--including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and
>
> (B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person

bringing the action establishes that no remedy was available to that person--

> (A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or
>
> (B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

STATEMENT OF THE CASE

The following facts were set out by the court of appeal below:

> Plaintiff George Beasley, a U.S. citizen, was injured while working in Malaysian waters aboard the Derrick Barge 52 (DB-52) owned by Malmac Sdn. Bhd. (Malmac), a Malaysian corporation. Malmac is 70% owned by Malaysians and 30% by McDermott International, Inc. (MII). MII is a foreign corporation registered under the laws of Panama. The DB-52 is a non-self-propelled barge that is registered under the laws of Malaysia and operates principally in Malaysian waters.
>
> Prior to plaintiff's injury, he signed an employment contract with MII on November 20, 1990. That agreement was apparently signed by Beasley while aboard another derrick barge, the DB-26, while working off the Malaysian coast. [fn] This employment contract was assigned to Malmac whenever an employee of MII worked for Malmac in Malaysian territory. There is an addendum to the contract wherein Beasley acknowledged this assignment.

(Appendix B, pp. B-2-B-3, 637 So.2d at 1220) (footnote supplied by the court of appeal).

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fn Previous to the contract, Beasley had been working under a contract that had been executed in the United States.

Additional facts are:

MII, a Panamanian corporation with an office in New Orleans, Louisiana, is involved in marine construction operations throughout the world. Mr. Beasley has been employed by MII, its subsidiaries and affiliates since 1964 to perform construction work (with the exception of layoffs during which time he worked for other companies). Since 1967, Mr. Beasley has worked overseas in, among other places, Kuwait, Beirut, the North Sea, Malaysia and Singapore.

Prior to working on the DB-52, Mr. Beasley was working on the DB-26 off the coast of Malaysia pursuant to an employment contract with MII which had been executed on February 7, 1990, in New Orleans, Louisiana and which specified that Mr. Beasley would work in Southeast Asia. At the time of his injury on the DB-52 on June 12, 1991, Mr. Beasley was working under a contract with McDermott International, Inc. signed on November 20, 1990 in Malaysian waters which provided for Mr. Beasley to work in Southeast Asia.

Many countries in Southeast Asia require that locally owned companies perform the marine construction work undertaken in their territorial waters. MII is a minority shareholder in Malmac Sdn. Bhd. (Malmac), a Malaysian corporation with its principal place of business in Kuala Lumpur, Malaysia. Thus, MII assigned Mr. Beasley's employment agreement to Malmac with the permission of Mr. Beasley.

The employment agreement signed by Mr. Beasley on November 20, 1990, provided that in the event of occupational illness or injury, the employee's benefits for such illness or injury shall be governed by the laws of the

country having jurisdiction over the area where the injury or illness arose (Malaysia). However, the agreement also provided that if those benefits were not at least equal to the benefits under the laws of Panama, then the employee's benefits would be adjusted to equal those in Panama. As of March 1994, Mr. Beasley was receiving ongoing medical and compensation benefits which totalled $158,759.53.

At the time of his injury, Mr. Beasley was working on the DB-52, an offshore derrick barge, which was constructed in Nagasaki, Japan in 1955 and rebuilt in Holland in 1974. The DB-52 has never entered into or operated in United States waters. The vessel has a multinational crew, a majority of whom are from Malaysia. The vessel was engaged in the construction of a platform in the Seligi Field on the Malaysian Continental Shelf. The operations, repairs and maintenance of the DB-52 were directed from Southeast Asia.

The federal questions sought to be reviewed were raised in the state court in Petitioner's Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment asserting that Plaintiffs' claims under the Jones Act, 46 U.S.C. app. § 688, and general maritime law of the United States should be dismissed because United States law does not apply to the Plaintiffs' action. After the district judge entered a judgment on April 26, 1994, that United States substantive law applied in this case (Appendix A), Petitioner's Application for Supervisory Writs was granted by the Fourth Circuit Court of Appeal of the State of Louisiana which held that Malaysian law and not United States law applied. (Appendix B, *Beasley v. McDermott International, Inc.*, 637 So. 2d 1219, 1221 (La. App. (4th Cir.) 1994)). The Louisiana Supreme Court then granted the Respondents' Application for Supervisory Writs, reversed the judgment of the court of appeal and reinstated the district

judge's ruling that American law applies in this case (Appendix C, *Beasley v. McDermott International, Inc.*, 640 So.2d 1326 (La. 1994)).

REASONS FOR GRANTING THE WRIT

1. The Louisiana Supreme Court Is Not The Supreme Court of Admiralty Law

The courts in Louisiana have a history of confrontation with the federal courts over principles of federal maritime law and interpretation of federal statutes. In numerous situations, the Louisiana courts have disagreed with the federal courts and declined to follow applicable federal law or have applied principles of Louisiana law rather than the governing federal law. Examples include the refusal to follow the exclusive remedy provisions of the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. § 905(a) (LHWCA), for employees covered under the LHWCA who receive injuries on land,[1] the awarding of damages in maritime cases which are not granted by the federal courts,[2]

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[1]*Compare* Peter v. Hess Oil Virgin Islands Corp., 903 F.2d 935, 952-53 and n.17 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991), and Fillinger v. Foster, 448 So.2d 321, 326 (Ala.), *cert. denied*, 469 U.S. 872 (1984) (declining to follow state law and upholding the exclusive remedy provision of the LHWCA) *with* Poche v. Avondale Shipyards, Inc., 339 So.2d 1212 (La. 1976), *appeal dismissed*, 434 U.S. 803 (1977) (application of Louisiana law to permit worker's suit against officers and fellow employees of employer company despite exclusive remedy provision of the LHWCA).

[2]*Compare* Mistich v. Pipelines, Inc., 609 So.2d 921, 934-35 (La. App. (4th Cir.) 1992), *writ denied*, 613 So.2d 996 (La.), *cert. denied*, 113 S. Ct. 3020 (1993) (declining to follow Miles v. Apex Marine Corp., 498 U.S. 19 (1990) and awarding punitive damages in an unseaworthiness claim) *with* Miller v. American President Lines, Ltd., 989 F.2d 1450, 1454-59 (6th Cir.), *cert. denied*, 114 S. Ct. 304 (1993) (holding that

and the application of Louisiana workers' compensation remedies for injuries occurring on the outer Continental Shelf of the United States despite the provision of the Outer Continental Shelf Lands Act (OCSLA) that compensation for injuries shall be payable under the LHWCA.[3] 43 U.S.C. § 1333(b).

A more recent dispute between the Louisiana courts and the federal courts involved the forum non conveniens doctrine. Disagreeing with the view of the United States Court of Appeals for the Fifth Circuit on the issue whether the state courts must apply the forum non conveniens doctrine in admiralty courts,[4] the Louisiana Supreme Court held that the doctrine was procedural and that the Louisiana courts could decline to follow the forum non conveniens doctrine in cases filed in Louisiana state court. *Markzannes v. Bermuda Star Line, Inc.*, 545 So.2d 537 (La. 1989), *cert. denied*, 493 U.S. 1043 (1990). After this Court agreed with

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punitive damages are not available in an unseaworthiness action based on this Court's decision in *Miles*).

[3]*Compare* LeSassier v. Chevron USA, Inc., 776 F.2d 506, 508-10 (5th Cir. 1985) (rejecting application of Louisiana law in connection with an injury on a platform located on the outer Continental Shelf off the Louisiana coast because of the provisions of the OCSLA and LHWCA) *with* Thompson v. Teledyne Movible Offshore, Inc., 419 So.2d 822, 828 (La. 1982), *appeal dismissed*, 464 U.S. 802 (1983) (allowing worker injured on a platform on the outer Continental Shelf off the coast of Louisiana to bring a suit to recover Louisiana workers' compensation benefits). The Texas courts have also rejected the Louisiana Supreme Court's interpretation of the OCSLA and follow the view of the federal courts. Torch Operating Co. v. Bartell, 865 S.W.2d 552, 557 (Tex. App.--Corpus Christi 1993, writ denied).

[4]*E.g.*, Exxon Corp. v. Chick Kam Choo, 817 F.2d 307, 320-21 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140 (1988); *see also* Ikospentakis v. Thalassic Steamship Agency, 915 F.2d 176, 179-80 (5th Cir. 1990).

the Louisiana Supreme Court that the Louisiana courts are not bound to apply the forum non conveniens rule in cases filed in the Louisiana state courts, *American Dredging Co. v. Miller*, 114 S. Ct. 981 (1994), the Louisiana Supreme Court has now turned its attention from procedural matters to substantive principles of admiralty law and the jurisdictional reach of federal statutes. Emboldened by its success in *Miller*, the Louisiana Supreme Court ruled in the present case, contrary to the principles enunciated by this Court and contrary to the uniform rule applied by the United States Courts of Appeals, that American law follows Americans around the world as they work on foreign vessels owned by foreign companies in localized operations in foreign waters.

While the Louisiana Supreme Court may determine the procedure to be applied in the Louisiana state courts, it is not the Supreme Court of substantive principles of admiralty law, nor may the Louisiana Supreme Court extend the application of federal statutes into the affairs of other countries without regard for the relevant interests of the international community. The present case involves the question whether a federal statute, the Jones Act, 46 U.S.C. app. § 688, and the general maritime law of the United States apply to an injury on a Malaysian vessel operating in navigable waters off the coast of Malaysia. This Court succinctly summarized the authority of the state courts in maritime settings in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), holding that state courts are bound by substantive principles of admiralty law:

> The legal rights and liabilities arising from that conduct were therefore within the full reach of the admiralty jurisdiction and measurable by the standards of maritime law. If this action had been brought in a state court, reference to admiralty law would have

> been necessary to determine the rights and liabilities of the parties.

Id. at 628 (citations omitted).

The Louisiana Supreme Court has usurped the role of this Court by interpreting the Jones Act and rewriting the general maritime law of the United States in order to conform to its protectionist philosophy that Americans should be able to assert American maritime remedies wherever they work around the world. The Louisiana Supreme Court has declined to recognize the admiralty law enunciated by this Court and has contradicted the uniform application of admiralty law by the federal appellate courts. Therefore, Petitioner, McDermott International, Inc., respectfully prays that this Honorable Court grant its Petition for Certiorari to the Louisiana Supreme Court to address the authority of the Louisiana Supreme Court to ignore controling principles of maritime law in its interpretation of federal maritime statutes and federal admiralty law.

2. Conflict With The Decisions Of This Court And The Circuit Courts

The decision of the Louisiana Supreme Court below misapplies the decisions of this Court and directly contradicts the decisions of the federal courts which follow the reasoning of this Court. The decision whether to apply the Jones Act and general maritime law of the United States to an international dispute was addressed by this Court in three cases: *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); and *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970). Larsen, a Danish seaman, was injured in Havana on a Danish ship owned by Lauritzen, a Danish citizen. After receiving compensation under Danish law, Larsen brought

suit against Lauritzen in New York seeking to recover under the Jones Act, 46 U.S.C. app. § 688. Larsen relied on the "literal catholicity" of the language of the Jones Act which extends a remedy to "any seaman who shall suffer personal injury in the course of his employment." *Lauritzen*, 345 U.S. at 576 (quoting the Jones Act, 46 U.S.C. app. § 688). However, this Court recognized that our maritime statutes were "enacted with regard to a seasoned body of maritime law developed by the experience of American courts long accustomed to dealing with admiralty problems in reconciling our own with foreign interests and in accommodating the reach of our own laws to those of other maritime nations." *Lauritzen*, 345 U.S. at 577. Thus, the Court interpreted the Jones Act in accordance with the "usage as old as the Nation," which applies such statutes "only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law." *Id.* In order to accommodate these concerns, the Court reviewed seven factors which "are generally conceded to influence choice of law to govern a tort claim, particularly a maritime tort claim." *Lauritzen*, 345 U.S. at 583. These factors are:

1. Place of the Wrongful Act
2. Law of the Flag
3. Allegiance or Domicile of the Injured
4. Allegiance of the Defendant Shipowner
5. Place of Contract
6. Inaccessibility of Foreign Forum
7. Law of the Forum

An eighth factor was added to the equation in *Rhoditis*, the shipowner's base of operations. *Rhoditis*, 398 U.S. at 309. These factors apply both to the claim under the Jones Act and to the claims under the general maritime law. *Romero*, 358 U.S. at 382.

The test for application of American law "is not a mechanical one." *Rhoditis*, 398 U.S. at 308. Instead, this Court has given weight and significance to the factors according to their proper application to international maritime commerce. In particular, the Court recognized the paramount importance of the law of the flag: "Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag." *Lauritzen*, 345 U.S. at 584. The considerations supporting application of the law of the flag "must prevail unless some heavy counterweight appears." *Id.* at 586. The Court explained: "It is significant to us here that the weight given to the ensign overbears most other connecting events in determining applicable law." *Id.* at 585.

Lauritzen, Rhoditis and *Romero* dealt with injuries sustained by foreign seamen. However, following the analysis set forth by this Court in *Lauritzen-Rhoditis*, the federal appellate courts have repeatedly dealt with injuries to citizens and permanent residents of the United States in situations which are virtually identical to the present case. The appellate courts in each circuit which has addressed the issue have uniformly applied the principles from *Lauritzen-Rhoditis* to hold that American law does not follow Americans when they travel to foreign waters to work on foreign vessels in localized operations in foreign waters. Contrary to these decisions, the Louisiana Supreme Court now permits litigants to engage in forum shopping not just for a favorable forum, but to obtain a different remedy and different result.

The United States Court of Appeals for the Fifth Circuit (the circuit court for Louisiana) has twice held, in fact situations almost identical to the present case, that United States law does not follow Americans who go to work

on foreign vessels in localized foreign operations. *Schexnider v. McDermott International, Inc.*, 817 F.2d 1159 (5th Cir.), *cert. denied*, 484 U.S. 977 (1987); *Fogleman v. Aramco (Arabian American Oil Co.)*, 920 F.2d 278 (5th Cir. 1991). Schexnider, an American citizen, entered into an employment contract in the United States with McDermott International, Inc. to work in Southeast Asia. He was injured in the Java Sea off the coast of Indonesia on the Derrick Barge 21, which was an Australian flagged vessel owned by an Australian corporation. Following the *Lauritzen-Rhoditis* factors as explained by this Court, the district court and Fifth Circuit concluded that Australian law, not American law, applied.

Schexnider made all of the arguments proffered by the Beasleys in the present case--that American law should apply to an American who has entered into an employment contract in the United States to work for a foreign subsidiary of McDermott, a Panamanian corporation which does business in the United States. Applying the reasoning from *Lauritzen-Rhoditis*, the Fifth Circuit flatly rejected these contentions. The fact that the "ultimate parent corporation," which owned an interest in the foreign company which owned the vessel was McDermott, a corporation doing business in the United States, was not considered to be significant given the fact that the day-to-day operations of the vessel were controlled by the Australian subsidiaries. *Id.* at 1162. The signing of the employment contract in the United States was not given any weight because the contract specifically provided that the Plaintiff was employed to work in Southeast Asia. *Id.* Following the principles enunciated by this Court in *Lauritzen*, the Fifth Circuit gave "particular significance" to the fact that Schexnider was injured on an Australian flagged vessel, applying "'the most venerable and universal rule of maritime law,' which 'overbears most other connecting events in determining applicable law . . . unless some heavy

counterweight appears.'" *Id.* (quoting *Lauritzen*, 345 U.S. at 584, 585, 586). In contrast to the *Lauritzen-Rhoditis* factors which favored application of Australian law was merely the fact that Schexnider was an American citizen. In view of the heavy balance of factors in favor of applying Australian law, the court held that Australian law governed the suit. *Schexnider*, 817 F.2d at 1162.

As in *Schexnider*, Beasley, an American citizen, was engaged by McDermott International, Inc., a Panamanian corporation which does business in the United States, to work in Southeast Asia (Malaysia). The employment agreement was assigned to Malmac, a Malaysian corporation, with Beasley's consent. This contract was executed in Malaysian waters; however, the prior contract executed by Beasley had been signed in the United States, like that in *Schexnider*. As in *Schexnider*, Beasley's contract specified that he would be assigned to work in Southeast Asia, and Beasley was injured on a vessel owned by a local company (Malmac, a Malaysian corporation) which was registered in and flew the flag of that country (Malaysia). Therefore, *Beasley* presents virtually the identical situation as in *Schexnider*. The only pertinent factor under *Lauritzen-Rhoditis* favoring American law is the citizenship of the plaintiff. In fact, the only real difference between *Schexnider* and *Beasley* is the particular area of Southeast Asia in which the plaintiff worked. *Schexnider* compels the conclusion that Malaysian law would apply to the present case based on the *Lauritzen-Rhoditis* factors.

Ignoring *Schexnider* and ignoring the heavy balance of the *Lauritzen-Rhoditis* factors against the application of American law, the Louisiana Supreme Court ruled in the present case that the nationality of the Plaintiff, together with McDermott International, Inc.'s minority ownership in Malmac, owner of the Malaysian vessel, was sufficient to

counterbalance not just the law of the flag but all of the other factors set forth by this Court. Had Beasley filed suit a few blocks down the street in federal court, the opposite holding would have resulted from that reached by the Louisiana Supreme Court.

The decision of the Louisiana Supreme Court below also conflicts with the decision of the Fifth Circuit in *Fogleman v. Aramco (Arabian American Oil Co.)*, 920 F.2d 278 (5th Cir. 1991). Fogleman, a Louisiana resident, obtained a foreign employment application in Louisiana so he could work in Saudi Arabia for Fluor Arabia, the Saudi Arabian subsidiary of a California corporation. Fogleman received a call in the United States that he was hired and then went to Saudi Arabia where he worked under a series of contracts signed in Saudi Arabia. Fogleman was assigned to supervise the electrification of an oil platform off the coast of Saudi Arabia and suffered a heart attack while swinging on a rope to transfer from the platform to a workboat alongside the platform.

Fogleman brought suit in federal court in Texas invoking the Jones Act and general maritime law. As in *Schexnider*, the Fifth Circuit did not consider the American ownership of the foreign subsidiary (in *Fogleman*, the California corporation owned a controlling interest of seventy percent) to be a pertinent factor because the base of operations for the work (day-to-day operations) was in Saudi Arabia. *Id.* at 284. Consequently, the only relevant factor favoring application of American law was the allegiance of the plaintiff. The Court reasoned that under *Lauritzen-Rhoditis*, "the allegiance of a plaintiff, even when recruited in the United States, does not mandate the application of United States law in a maritime suit when all of the other factors indicate the application of foreign law." *Id.* Thus, the Fifth Circuit held that Saudi Arabian law applied to the

claim. Like *Schexnider*, the facts in *Fogleman* mirror those in the present case. Had the Beasleys, who are residents of Mississippi, filed suit in federal court in Texas, instead of in Louisiana state court, the opposite holding would have resulted.

The opposite conclusion from that reached by the Louisiana Supreme Court would not only occur in the federal courts in Louisiana and Texas.[5] A contrary result would also be reached in all other circuits in which the issues in this case have been presented. Whether the Plaintiffs brought this suit in California on the West Coast or in New York on the East Coast, the result would be the same as in the Fifth Circuit--application of Malaysian law. *Bilyk v. Vessel Nair*, 754 F.2d 1541 (9th Cir. 1985); *Tjonaman v. A/S Glittre*, 340 F.2d 290 (2d Cir.), *cert. denied*, 381 U.S. 925 (1965).

In *Bilyk*, a United States citizen seeking work in California learned that the owners of the Mexican fishing vessel Nair needed a helicopter pilot to scout for fish. Bilyk boarded the vessel in Mexico, signed contracts for each fishing trip in Mexico and was injured on the high seas off the Mexican coast. The Nair flew the Mexican flag and was owned by a Mexican corporation. The majority shareholder, although a Mexican citizen, temporarily resided in California. Citing *Lauritzen*'s emphasis on the law of the flag and considering the other *Lauritzen-Rhoditis* factors

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[5]The decision of the Louisiana Supreme Court to apply American law in the present case also conflicts with the opinions of the federal district courts in Texas and Louisiana which have declined to apply American law for the injuries suffered by Americans injured in localized foreign operations. *See, e.g.*, Stevenson v. Global Marine Drilling Co., 678 F. Supp. 1274, 1276 (W.D. La. 1987); Quaide v. Union Oil Co., 1991 AMC 671, 673-74 (S.D. Tex. 1990); Bodden v. Osgood, 1988 WL 137473 (E.D. La. 1988), *appeal dismissed*, 879 F.2d 184 (5th Cir. 1989).

pointing to the application of Mexican law, the Ninth Circuit held: "we will not extend the reach of American law into the province of another sovereign." *Bilyk*, 754 F.2d at 1545. As the plaintiff had chosen to work in Mexico, the court reasoned: "It would be perverse to allow him to choose his forum by holding that a return trip to Mexico is unduly onerous." *Id.* at 1543.

In *Tjonaman*, the Second Circuit addressed an injury sustained by a Dutch national who had become a legal resident alien in the United States. The plaintiff signed Norwegian shipping articles in New York to sail on a Norwegian vessel, owned by Norwegians and was injured in Ghanian waters. The plaintiff sought to invoke the general maritime law of the United States, but the Second Circuit found his residency in the United States to be insufficient "to outweigh the 'venerable and universal rule'" giving cardinal importance to the law of the flag. *Tjonaman*, 340 F.2d at 292. Thus, Norwegian law and not American law applied to the plaintiff's claim.

The choice-of-law factors enunciated by this Court have been uniformly applied by the federal appellate courts in accordance with the analysis of this Court in *Lauritzen-Rhoditis*. The fact that an American citizen or resident is the plaintiff cannot counterbalance the weight of all of the other factors when a localized operation in a foreign country's waters is being performed on a vessel registered in that country and owned by a citizen of that country. There is nothing arbitrary or fortuitous about the application of foreign law in that situation. In fact, the DB-52 has never operated in or even entered United States waters. The flag of the vessel is not one of convenience but of *necessity* to work in localized operations, such as construction of a platform on the Continental Shelf of another country. The only fortuitous result would be if a plaintiff can engage in

forum shopping to the Louisiana state courts and apply different substantive law than in any other courts in the United States or the world. Therefore, Petitioner, McDermott International, Inc. respectfully requests that this Court grant Petitioner's writ of certiorari to resolve the conflict between the decision of the Louisiana Supreme Court and the decisions of all the federal appellate courts on the application of American law to this foreign injury.

3. The Application Of American Law By The Louisiana Supreme Court Is An Improper Exercise In Social Jingoism

This case does not involve merely a conflict between federal and state courts, an improper interpretation of federal statutes or an overextension of the geographic reach of the general maritime law of the United States. The issue of paramount importance in this case is the international ramifications from the protectionist view taken by the Louisiana Supreme Court.

This Court recognized in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), that the application of the Jones Act and general maritime law of the United States does not just involve a consideration of "the sovereign power of the United States to apply its law to situations involving one or more foreign contracts." *Romero*, 358 U.S. at 382 (footnote omitted). Instead, the Court set out the controlling considerations:

> But in the absence of a contrary congressional direction, we must apply those principles of choice of law that are consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign

> nations in the regulation of maritime commerce as part of the legitimate concern of the international community. These principles do not depend upon a mechanical application of a doctrine like that of lex loci delicti commissi. The controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them we must move with the circumspection appropriate when this Court is adjudicating issues inevitably entangled in the conduct of our international relations.

Romero, 358 U.S. at 382-83.

These fundamental principles of the general maritime law were initially enunciated by the Court in *Lauritzen* where the Court stated that the maritime law "has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved." *Lauritzen*, 345 U.S. at 582. The Court summarized this principle as follows:

> Hence, courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality. It has the force of law, not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations.

Id. at 581-82 (footnote omitted). Based on these considerations, the United States Court of Appeals for the Fourth Circuit, sitting en banc, stated: "If the courts of each nation with substantial contacts applied their own law, the overlapping duties imposed on shipowners would blight maritime shipping." *Dracos v. Hellenic Lines, Ltd.*, 762 F.2d 348, 351 (4th Cir.) (en banc), *cert. denied*, 474 U.S. 945 (1985).

In the present case, McDermott International, Inc. does marine construction work in localized operations in foreign countries throughout the world. In order to do business within these countries, it is necessary that McDermott International, Inc. comply with the laws of each country. For example, the DB-52 is owned and operated by Malmac Sdn. Bhd., a corporation organized and existing under the laws of Malaysia with its principal place of business in Kuala Lumpur, Malaysia. Malmac has no office or employees in the United States and does no business in the United States. McDermott International, Inc. assigned its employees to Malmac, and the employees' services were performed under the direction and control of Malmac. A majority and controlling amount of the stock of Malmac is owned by Malaysians.

When an American goes to work overseas in a localized construction operation in the waters of a foreign country on a vessel owned by a citizen of that country under an employment contract assigned to a company based in that country and organized under that country's laws, it is more than unreasonable to contend that he carries the protection of American law with him. It is simply a variety of "social jingoism" to assert that American law must be exported for the protection of Americans around the world, whether they are American companies or American workers. *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 902 (3d Cir. 1977), *cert.*

denied, 435 U.S. 904 (1978); *Chirinos de Alvarez v. Creole Petroleum Corp.*, 613 F.2d 1240, 1247 (3d Cir. 1980).

The eight *Lauritzen-Rhoditis* factors were set forth by this Court because the Court moved with circumspection in adjudicating issues which are entangled in the conduct of our international relations. These factors give due regard to the relevant interests of foreign nations in the regulation of maritime commerce. In contrast, the parochial attitude of the Louisiana Supreme Court that American law must be exported with Americans who work in localized operations in foreign countries runs aground on these fundamental principles. Rather than moving with circumspection with regard to foreign operations, the Louisiana Supreme Court has boldly asserted that American law applies to a worker who signs an employment contract in Malaysian waters to work in a localized Malaysian construction operation on a vessel registered in Malaysia, flying a Malaysian flag and owned by a Malaysian company.

Applying American law to this Malaysian operation is the worst form of social jingoism. The Louisiana Supreme Court has thrown aside any consideration of the interests of Malaysia in regulating localized construction on its Continental Shelf and now dictates to Malaysia that American law applies to its construction operations any time an American steps across its border. Moreover, this attitude plays directly into the prospects for international retaliation which this Court sought to avoid by its application of the *Lauritzen-Rhoditis* factors:

> But in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant

> application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.

Lauritzen, 345 U.S. at 582.

It is unquestionable after *American Dredging Co. v. Miller*, 114 S. Ct. 981 (1994), that the Louisiana Supreme Court may choose the procedure to be applied in the state courts of Louisiana. However, the Louisiana Supreme Court has now overstepped its authority across the boundary of a sovereign country, Malaysia, to extend the protection of American law into that country's local operations. While the Louisiana Supreme Court may be sovereign over the procedure applied in the courts within the boundaries of Louisiana, it cannot ignore the dictates of this Court and the fundamental principles of general maritime law and international comity by overextending United States law into the affairs of another country.

Wherefore, Petitioner, McDermott International, Inc. respectfully prays that this Court grant Petitioner's writ of certiorari to address the reach of United States law into localized operations on the Malaysian Continental Shelf.

CONCLUSION

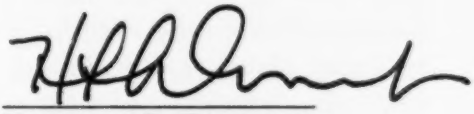
Having successfully established Louisiana as the courthouse for the world's maritime disputes, the Louisiana Supreme Court now challenges this Court and the lower federal courts for supremacy over the interpretation of a federal statute, the Jones Act, and the application of substantive principles of the general maritime law of the United States. By setting up a conflict with the federal appellate courts, the Louisiana Supreme Court has now

created a different rule of law in Louisiana state courts than is applied a few blocks down the street at the federal courthouse, across state lines or across international boundaries.

The conflict with all of the other maritime courts is only the beginning of the problem with the decision of the Louisiana Supreme Court below, however. This case involves construction work being performed on the Malaysian Continental Shelf by a Malaysian company from a vessel registered in Malaysia, flying the Malaysian flag and owned by a Malaysian company. The decision to apply American law to that operation violates fundamental principles of general maritime law and international law which are based on mutual respect for the interests of other countries. In its zeal to protect an American who was injured in a construction operation in Malaysia, the Louisiana Supreme Court has overstepped its authority, interfered with the sovereignty of a foreign nation and violated international comity.

WHEREFORE, Petitioner, McDermott International, Inc., respectfully prays that this Court grant Petitioner's writ of certiorari, reverse the decision of the Louisiana Supreme Court and reinstate the decision of the court of appeal that Malaysian law applies in the present case.

Respectfully submitted,



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APPENDIX A

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 92-1570 DIVISION "L"

ROSEMARY BEASLEY, wife of and
GEORGE BEASLEY

VERSUS

MCDERMOTT INTERNATIONAL, INC.

JUDGMENT

IT IS ORDERED that United States substantive law be applied in this case.

Writs of review from this decision shall be taken no later than ten (10) days from the signing of the judgment.

New Orleans, Louisiana, this 26 day of April, 1994.

/s/ Max N. Tobias, Jr.
JUDGE

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/s/ illegible
DEPUTY CLERK,
CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA.

APPENDIX B

ROSEMARY BEASLEY, WIFE OF/AND GEORGE BEASLEY

VERSUS

MCDERMOTT INTERNATIONAL, INC.

NO. 94-C-0893

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

* * *

ON WRIT OF CERTIORARI FROM
CIVIL DISTRICT COURT, FOR THE
PARISH OF ORLEANS
NO. 92-1570, DIVISION "L"
HONORABLE MAX N. TOBIAS, JR., JUDGE

* * *

ROBERT L. LOBRANO
JUDGE

* * *

(Court composed of Chief Judge Patrick M. Schott, Judge Robert L. Lobrano and Judge Steven R. Plotkin)

May 24 1994

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FOR RESPONDENT

REVERSED AND REMANDED

We granted certiorari to consider the issue of whether the substantive maritime law of the United States or foreign law is to be applied in this case.[1] The trial judge ruled that American law is applicable. Defendant sought writs to this court to review that ruling.

Plaintiff George Beasley, a U.S. citizen, was injured while working in Malaysian waters aboard the Derrick Barge 52 (DB-52) owned by Malmac Sdn. Bhd. (Malmac), a Malaysian Corporation. Malmac is 70% owned by Malaysians and 30% by McDermott International, Inc. (MII). MII is a foreign corporation registered under the laws of Panama. The DB-52 is a non-self-propelled barge that is registered under the laws of Malaysia and operates principally in Malaysian Waters.

Prior to plaintiff's injury he signed an employment contract with MII on November 20, 1990. That agreement was apparently signed by Beasley while aboard another derrick barge, the DB-26, while working off the Malaysian coast.[2] This employment contract was assigned to Malmac whenever an employee of MII worked for Malmac in

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[1] Neither personal jurisdiction over defendant, nor forum non conviniens are issues in this writ application.

[2] Previous to this contract, Beasley had been working under a contract that had been executed in the United States.

Malaysian territory. There is an addendum to the contract wherein Beasley acknowledged this assignment.

Summarizing, plaintiff is a U.S. Citizen employed by a Panamanian Corporation, who was injured while working on a Malaysian vessel, in the territorial waters of Malaysia. The issue is whether, under these facts, the plaintiff can recover under the Jones Act and U.S. general maritime law in his lawsuit filed against MII in Civil District Court.

Two U.S. Supreme Court cases, Lauritzen v. Larsen, 345 U.S. 571, 73 S.Ct. 921 (1953) and Hellenic Lines Limited v. Rhoditis, 398 U.S. 306, 90 S.Ct. 1731 (1970), are controlling.[3] Those two cases set forth eight basic factors to be considered in deciding this issue. Often referred to as the Lauritzen v. Rhoditis factors, they are: "(1) the place of the wrongful act (here, Malaysian waters); (2) the law of the flag (the DB-52 is flagged in Malaysia); (3) the allegiance or domicile of the injured worker (Beasley is a U.S. Citizen); (4) the allegiance of the defendant shipowner (the DB-52 is owned by Malmac, which is 70% Malaysian and 30% Panamanian); (5) the place of the contract (Malaysian waters); (6) the inaccessibility of the foreign forum (unknown, no evidence); (7) the law of the forum, and (8) the vessel owner's base of operations (Malaysia).

In Powell, supra, ftn. 3, our Supreme Court analyzed the Lauritzen v. Rhoditis factors and concluded no one factor is controlling. The court, however, recognized that the "law of the flag (meaning the country where a vessel is registered) is perhaps the most important factor ...." Id. at 87. It also recognized that the allegiance or domicile of the injured plaintiff is an important "counterweight" to the law of the flag.

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[3] Federal substantive admiralty or maritime law controls. See, Powell v. McDermott International, 588 So.2d 84 (La. 1991).

In the case before us, the law of the flag and the plaintiff's domicile equally counterbalance each other. However, unlike Powell, all of the other factors (except perhaps, law of the forum, which Lauritzen noted carried little weight) favor application of Malaysian law. We do not find Powell controlling and therefore reverse the ruling of the trial court. Plaintiff's claims should be decided under the applicable Malaysian law.

REVERSED AND REMANDED.

APPENDIX C

The Supreme Court Of The State Of Louisiana

ROSEMARY BEASLEY, WIFE OF/AND
GEORGE BEASLEY

NO. 94-C - 1352

VS.

MCDERMOTT INTERNATIONAL INC.

- - - - - -

IN RE: Beasley, Rosemary; Beasley, George; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, Number 94CA-0893; Parish of Orleans Civil District Court Div. "L" Number 92-01570

- - - - - -

June 24, 1994

Granted. See per curiam.

WFM

PFC

PH

ROO

WATSON, J., concurs in the result.

LEMMON, J., and KIMBALL, J., would grant and docket.

DENNIS, J., not on panel.

Supreme Court of Louisiana
June 24, 1994

/s/ illegible
Deputy Clerk of Court
For the Court

JUN 24 1994

SUPREME COURT OF LOUISIANA

NO. 94-C-1352

ROSEMARY BEASLEY, WIFE OF/AND
GEORGE BEASLEY

V.

MCDERMOTT INTERNATIONAL, INC.

PER CURIAM•

As we explained in Powell v. McDermott International, Inc., 588 So. 2d 84 (La. 1991), the factors set forth in Lauritzen v. Larsen, 345 U.S. 571 (1953), and Hellenic Lines Limited v. Rhoditis, 398 U.S. 306 (1970), are not all treated equally. Although the law of the flag of the

• Dennis, J. not on panel.

vessel is perhaps the most important factor, the domicile of the injured plaintiff, especially if an American on a foreign-flagged vessel, has been considered an important "counterweight."

In the present case, plaintiff was an American domiciliary injured on a Malaysian-flagged vessel. Plaintiff's original employment contract, signed on February 7, 1990 in New Orleans, did not make foreign law applicable to the contract.[1] Although the vessel on which plaintiff was injured was registered to a Malaysian corporation, that corporation was partially owned by McDermott. We believe these factors effectively counterbalance the law of the flag.

Accordingly, we conclude that the trial court correctly held that American law applies to this case. The judgment of the court of appeal is reversed. The judgment of the trial court denying McDermott's motion for summary judgment is reinstated, and the case is remanded to the trial court for further proceedings.

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[1] Although a second contract, signed on November 20, 1990 at sea in foreign waters, purported to make foreign law applicable, no reason was given for requiring this contract and the only significant difference between this contract and the earlier contract was the foreign law clause.

APPENDIX D

The Supreme Court Of The State Of Louisiana

ROSEMARY BEASLEY, WIFE OF/AND
GEORGE BEASLEY

No. 94-C-1352

VS.

MCDERMOTT INTERNATIONAL, INC.

In Re: McDermott International, Inc, applying for Rehearing of an Order of this Court dated June 24, 1994; Parish of Orleans Civil District Court No. 92-01570; Court of Appeal, Fourth Circuit No. 92-CA-0893

September 16, 1994

Rehearing denied.

WFM
PFC
JCW
PH
FTW

LEMMON & KIMBALL, JJ., would grant the rehearing.
DENNIS, J., not on panel.

Supreme Court of Louisiana
September 16, 1994

/s/ illegible
Clerk of Court
For the Court